Brad Snodgrass, Inc. *and* Local Union No. 20, Sheet Metal Workers International Association, a/w Sheet Metal Workers International Association, AFL–CIO. Case 25–CA–27500–1

April 9, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On March 1, 2002, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brad Snodgrass, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Joanne C. Mages, Esq., for the General Counsel.
Philip F. Snodgrass, President of Brad Snodgrass, Inc., of Indianapolis, Indiana, for the Respondent.
Paul T. Berkowitz, Esq., of Chicago, Illinois, for the Charging Party.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing these findings.

In finding that the Respondent violated the Act by threatening retaliation and actually retaliating against employees because the Union filed grievances on their behalf, we find it unnecessary to rely on the judge's citation of *BE&K Construction Co.*, 329 NLRB 717 (1999), enfd. 246 F.2d 619 (6th Cir. 2001), revd. 536 U.S. 516 (2002); *Diamond Walnut Growers*, 312 NLRB 61 (1993), enfd. 53 F.3d 1095 (9th Cir. 1995); and *Dahl Fish Co.*, 279 NLRB 1084, enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987).

The judge, at sec. II,E, finds that the Respondent violated Sec. 8(a)(1) of the Act by sending to a union representative two letters, in response to the Union's filing of grievances on the employees behalf, which threatened loss of employment for bargaining unit members because of the representative's protected activity. The Respondent has neither specifically excepted to nor presented argument with respect to those findings, and we therefore adopt them.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on October 9 and 10, 2001. The charge and amendments thereto were filed by Local Union No. 20, Sheet Metal Workers International Association, a/w Sheet Metal Workers Association, AFL–CIO (Local 20 or the Union) against Brad Snodgrass, Inc. (Respondent), resulting in a complaint issuing on July 30, 2001.[1] It is alleged in the complaint that Respondent violated Section 8(a)(1) of the Act by: (a) threatening employees with loss of jobs because the Union raised complaints about wages; (b) informing employees that employees were being laid off because the Union had filed grievances under the collective-bargaining agreement; (c) instructing employees to request the Union to withdraw grievances and complaints under the collective-bargaining agreement; and (d) promising its employees recall from layoff if the Union withdrew pending grievances. It is alleged in the complaint that Respondent violated Section 8(a)(1) and (3) of the Act by on about January 31, laying off employees Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan because the Union had filed grievances under the collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a contractor engaged in sheet metal fabrication and installation with an office and place of business in Indianapolis, Indiana, from which it annually performs services valued in excess of $50,000 in states outside of the State of Indiana. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2] Respondent admits and I find that Local 20 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Philip Snodgrass is Respondent's president and his son, Brad Snodgrass (B. Snodgrass), is Respondent's vice president of

[1] All dates are in 2001 unless otherwise indicated.

[2] Respondent admitted that it engaged in a business generating the amount of income in the manner set forth above in its amended answer to the complaint. It also admitted in its amended answer that it is an employer engaged in commerce within the meaning of Sec. 2(2) and (6) of the Act but denied that Sec. 2(7) of the Act is applicable. However, Respondent argues in its posthearing brief that the General Counsel has failed to establish it is engaged in commerce. I find that Respondent, by its admissions, generates sufficient income across state lines to establish that it is engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. See *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992).

operations.[3] Respondent admits that Philip and B. Snodgrass are supervisors and agents within the meaning of Section 2(11) and (13) of the Act. The General Counsel amended the complaint at the hearing to allege and Respondent denies that Superintendent James Turner and Foreman Dennis Lackey are its statutory supervisors and agents. B. Snodgrass' responsibilities include oversight of Respondent's shop and field operations. In December 2000 through May 2001, Respondent performed work at a General Motors truck and bus plant (the GM jobsite) in Roanoke, Indiana, located near Fort Wayne. The 13 alleged discriminatees worked for Respondent at the GM jobsite and their January 31 layoff is at the center of the dispute in this proceeding. B. Snodgrass testified that he consulted with Turner and Lackey about the layoff which was a joint decision by those three individuals.[4]

A. The Alleged Supervisory Status of James Turner and Dennis Lackey

Turner is a field superintendent and he served in that capacity for Respondent at the GM jobsite. Turner reports to B. Snodgrass. Turner, as a field superintendent, manages and has daily contact with the foremen on field projects. Turner moves between multiple jobsites. When at the GM site, Turner was Respondent's highest level official at the site. B. Snodgrass testified that Turner has input in directing the work force at the jobsite, along with the estimator, project manager, and the foreman. Turner has authority to discipline employees at the site depending on the infraction. B. Snodgrass usually follows Turner's recommendation concerning discipline. B. Snodgrass testified that, within the 5 years preceding the hearing, Turner has fired at least two employees and informed B. Snodgrass after the fact. Turner also recommends layoffs to B. Snodgrass and his recommendation is usually followed. Turner recommended between 5 and 10 layoffs within the 5 years preceding the hearing and his recommendations were followed except on only a couple of occasions.

Dennis Lackey was the foreman at Respondent's GM jobsite. B. Snodgrass testified that Lackey, as foreman, is in charge of a jobsite, that he directs the employees' work, and determines their assignments taking into consideration a customer's needs. However, if a customer's plans change, Lackey contacts Respondent's office for instructions. Lackey does not have authority to tell employees that they can leave early. Lackey can verbally reprimand employees, but would have to consult with Turner to issue more severe discipline. If an employee was going to be absent from work they would phone Respondent's office. Depending on the size of his crew, which ranges from 4 to 20 employees, Lackey performs varying amounts of hands on work. At the GM jobsite, Lackey spent half the time working with the crew, and the rest of the time he was checking on the work of others, or pulling material for the crew. B. Snodgrass testified that Lackey's duties as foreman were to ensure that the people were working, that they had materials, that they were working safely, to review their work, and to tell them what to do. Respondent employee, James Horstman, testified that Lackey was the main person guiding workers at the GM jobsite and that Lackey gave Horstman his daily assignments.

The burden of proving that an individual is a statutory supervisor rests with the party asserting it. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Section 2(11) of the Act defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care*, supra at 713, the Court stated Section 2(11) of the Act:

> sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994).

I find that Turner exercises independent judgment in the lay off and discipline of employees and that Turner is a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. I find that the record evidence does not establish that Lackey is a supervisor within the meaning of Section 2(11) of the Act. The General Counsel contends that Lackey is a statutory supervisor because he responsibly directs employees. However, the evidence as to Lackey's decision making process in according employees their assignments is minimal and fails to demonstrate that he exercises independent judgment. While Lackey may exercise sufficient independent judgment to be a statutory supervisor, the General Counsel has failed to prove this is the case in this proceeding.[5]

I do find that Lackey is Respondent's agent within the meaning of Section 2(13) of the Act. I find that Respondent placed Lackey in a position where employees "could reasonably believe he spoke on behalf of management." See *United States Service Industries*, 319 NLRB 231 fn. 2 (1995), enfd. 107 F.3d

[3] Brad Snodgrass is the only individual named Snodgrass who testified at the hearing.

[4] Turner and Lackey were employed by Respondent at the time of the hearing but did not testify.

[5] See *Iron Workers Local 28 (Virginia Assn. of Contractors)*, 219 NLRB 957, 961 (1975), where a group of working foremen and a general foreman were found not to be statutory supervisors when they acted "within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor." Their authority was found to be routine not requiring the use of independent judgment. See also *Electrical Workers Local 3 (Cablevision)*, 312 NLRB 487, 488–489 (1993); *George C. Foss Co.*, 270 NLRB 232, 234–235 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985); and *Ogden Allied Maintenance Corp.*, 306 NLRB 545, 546 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993).

923 (D.C. Cir. 1997). Lackey gave employees their assignments on a daily basis, and was the only official on the part of Respondent to routinely give instructions to employees. The statements at issue here pertaining to Lackey related to his predictions as to the length of the employees' employment at the GM facility. The statements are related to the work assignments that Lackey issued to employees. Moreover, B. Snodgrass testified that Lackey participated in the decision to lay off the employees on January 31, although the extent of his participation was not documented on the record.

B. The Work at the GM Jobsite and the Layoff of the Fort Wayne Area Employees

Local 20 is located in Indianapolis but has different contractual areas that it administers throughout the State of Indiana. David Platt is a business representative for Local 20. It is Platt's responsibility to dispatch employees in Local 20's Fort Wayne area to their job assignments. Respondent is signatory to the "National Maintenance Agreement" (NMA) a collective-bargaining agreement with the Sheet Metal Workers International Association (the International Union). Respondent is also signatory to the "Standard Form of Union Agreement" (SFU Agreement) with Local 20, which pertains to counties in the Indianapolis area. It is Platt's view that because the Respondent is signatory to the NMA and the SFU Agreement that certain provisions of Local 20's collective-bargaining agreement with the Fort Wayne area Sheet Metal Contractors Association, Inc., (the Fort Wayne Agreement) apply to Respondent when it performs work in the Fort Wayne area. Respondent takes issue with this position.

Platt met with B. Snodgrass and Turner on December 20, 2000, for a prejob conference for the GM jobsite. Platt's credited testimony reveals that Turner told Pratt that Respondent was going to work two shifts at the project with 10 men per shift and that Turner wanted to start on December 23, 2000, and work that week up through December 31. Turner stated that they were to work every day, except for Christmas and New Year's day, December 31. Turner was not sure of the duration of the project, but stated that they wanted to complete it sometime before June 1. Platt approved Turner's request for Respondent to bring in four employees from Indianapolis to work on the project.

The parties stipulated at the hearing to the following: The 13 alleged discriminatees named in the complaint started working for Respondent at the GM jobsite on either December 23 or 26, 2000, and they were laid off on January 31. Platt referred the alleged discriminatees, who were Local 20 Fort Wayne area members, to Respondent for work at the GM jobsite. The job began during a GM Christmas shutdown and the employees worked up to New Years with a day and a night shift. Following the Christmas shutdown, Respondent's GM jobsite employees worked alternating weekends with about half of the employees working 1 weekend on Saturday and Sunday days and the other half working Saturday nights. The employees alternated work schedules the following weekend. The credited testimony revealed that most of the weekend second-shift work took place on Saturdays, although there was an occasional Sunday evening shift.

Platt's credited testimony reveals the following:[6] GM jobsite steward, Mike Leach, informed Platt that Respondent did not work the employees on December 24, 2000, or on January 7. Platt called Turner on January 9, to protest the employees' failure to work on those dates. The issue was not resolved. On January 9, Platt filed a grievance under the NMA through the "National Maintenance Agreement Policy Committee" (NMAPC). Platt faxed a copy of the grievance to Respondent and to the International Union. The grievance asserts that no work was performed on December 24, 2000, and on January 7, contrary to statements made by Respondent at the prejob meeting. It is asserted in the grievance that Respondent violated NMA article XII, section 1 by failing to work on those dates. A few days after Platt filed the grievance, B. Snodgrass called Platt and they discussed the grievance without resolution.

On January 9, Leach informed Platt that Respondent was not paying employees a $.25-shift differential for second-shift work and that Respondent was failing to make a $.90-per-hour credit union deduction from employees' pay, the latter being a requirement of the Fort Wayne Agreement. Platt faxed a copy of a Fort Wayne area wage sheet to Respondent on January 9, listing the credit union deduction. On January 24, Leach told Platt that he had spoken to Lackey about the need for dust masks on the job. Platt faxed a letter to B. Snodgrass on that date requesting dust masks be issued on the job. Platt received a fax from B. Snodgrass the same day stating that the masks would be provided.

On January 26, Platt received a faxed notification from Respondent that it was laying off Leach and employee Fernando Alvarez. Platt called Turner on January 26, and Turner refused Platt's request to reconsider the layoff. Platt also spoke to B. Snodgrass and asked him if he would reconsider laying off Leach. Platt suggested that B. Snodgrass split up Leach and Alvarez to improve their productivity rather than laying them off. The conversation ended with B. Snodgrass stating that he would check with Lackey. Platt filed a grievance under the Fort Wayne Agreement on January 29 asserting that Leach was laid off out of order citing addendum X, section 1(e). Platt faxed a copy of the grievance to B. Snodgrass on January 29.[7] Platt also filed a grievance under the NMA concerning Leach's layoff and he faxed Respondent a copy of the grievance. The NMA grievance asserts that Respondent laid off Leach because of his "Steward activities" and that the other employee was laid

[6] I found Platt, taking into consideration his demeanor, to be a credible witness. Much of his testimony was corroborated by documentary evidence or not in dispute. While Respondent Representative Philip Snodgrass took issue with Platt's testimony concerning the faxing to Respondent of certain grievances under the NMA there was no specific testimony drawn by Respondent denying the receipt of these documents. Moreover, B. Snodgrass faxed letters to Pratt and the Union acknowledging that the Union had raised contractual claims under the NMA. I have therefore credited Platt's testimony as to the sequence of events set forth in the body of this decision. In doing so, I have considered Platt's failure to keep fax transmittal confirmations but have concluded that this alone was not sufficient to discredit Platt's testimony.

[7] Philip Snodgrass asserted at the hearing that Respondent was not signatory to this agreement and that this was an improperly filed grievance.

off because he worked with Leach. The grievance cites article VII, section 1 of the NMA.

Platt called B. Snodgrass on January 26 to discuss Respondent's failure to pay the $.25-shift differential for second-shift work. Platt stated that under the NMA someone working second shift is entitled to an additional $.25 per hour. B. Snodgrass disagreed. Platt told B. Snodgrass that he would fax him an example for shift pay as well as a bulletin substantiating Platt's interpretation of shift pay. B. Snodgrass stated that he had never paid shift pay on an NMA job. On January 27, Platt faxed a handwritten letter to Respondent's payroll department asserting that the employees working the second shift at the GM jobsite should be collecting an additional $.25-shift pay and that it was mandatory for Fort Wayne members to have $.90 deducted from their checks and deposited into their credit union. On January 29, Platt received a faxed response from Dennis Joyce, who is in charge of Respondent's payroll. The fax acknowledged Platt's note about shift pay, but stated that, "[a]ccording to the contract any 10 hours on Saturday is paid at time and one half and Sunday is paid at double time. Neither one of these days pay a shift premium."

On January 29, Platt called B. Snodgrass about the shift pay but the two continued to disagree. Platt faxed Snodgrass a copy of a bulletin concerning the NMA in support of Platt's shift pay interpretation. On January 29, Platt filed a grievance under the Fort Wayne Agreement concerning shift pay. Platt faxed a copy of the grievance to Respondent. It cites article XIV, section 2 of the NMA and addendum VIII, section 3(d) of the "Local agreement" and it contends that Respondent failed to pay appropriate shift pay under the NMA and to make credit union contributions required by the Local Agreement.[8] Platt also filed a grievance under the NMA on January 29 on the shift-pay issue and he faxed a copy to Respondent on that date. The grievance asserted that Respondent violated article XIV, section 2 of the NMA by not paying the appropriate shift pay work for work performed on the second shift.

On January 30, B. Snodgrass faxed a letter to Pratt which reads as follows:

> In Reference to your first grievance about not working December 24th and working the following Sunday please refer to NMA article XXIII(1).
>
> In reply to the grievance filed on January 29, it is without merit, read NMA article XIX(2) and NMA article XXII(1) of the current agreement.
>
> Regarding your request for pay greater than what the current NMA calls for please refer to article XV(3) 'All work commencing with the beginning of established work day on Saturday shall be paid at the rate of time and one-half.' The bulletin you supplied is outdated and does not apply to our current contract.
>
> If this is a problem for you, or any of your men, let me know and we will lay off all of the Fort Wayne people. Try me: I will make sure the men know who cost them their jobs.

[8] Philip Snodgrass admitted that Respondent received this fax.

B. Snodgrass testified that he called Respondent's Fort Wayne area employees on January 31, to inform them that they were being laid off. B. Snodgrass testified that he called all of the employees because he felt badly because the layoff was right after Christmas and "I felt like I owed these gentlemen an explanation." B. Snodgrass laid off all of the employees working at the GM jobsite except for the four employees from Indianapolis. The credited uncontradicted testimony of the alleged discriminatees reveals that B. Snodgrass initiated the following phone conversations with them at the time that he informed them that they were being laid off.

B. Snodgrass told Kay Smith that he was laying her off along with all the Fort Wayne employees, that he had a stack of grievances on his desk, and he was tired of them. He stated that he was pleased with Smith's work, but he could not deal with the grievances any more. B. Snodgrass cited the grievance for the $.25-shift bonus and said, "I am not dealing with it and if you could call Dave Platt and let him know, I would do that,". . . "to let him know he is the reason you are losing your job." B. Snodgrass told Smith that GM had taken the time limit off the job and so he could man it with the four Indianapolis men.[9]

B. Snodgrass told Jack Johnston that he was being laid off. B. Snodgrass stated that "he was sorry but he had a stack of grievances to go through and nobody would be going to work up there until they got to the bottom of it." B. Snodgrass told Johnston that he should call the business agent and let him know about it. B. Snodgrass stated that there was nothing that he could do until the grievances were settled with the International. B. Snodgrass stated that they were bogus grievances and that every time he came into the Fort Wayne work area he had a lot of trouble trying to do the work.

B. Snodgrass told Timothy Tanner that there was a problem at the jobsite. B. Snodgrass stated that grievances were filed over $.25-per-hour premium pay for the night shift and that he had no intention of paying it. B. Snodgrass told Tanner to call Platt and discuss it with him and that if grievances or if the problems were solved, they would be going back to work. B. Snodgrass called Joseph Grubb and asked Grubb if he was used to receiving the $.25-shift bonus listed in the NMA. Grubb told him yes. B. Snodgrass stated that they did not pay it in Indianapolis and that by pushing for the $.25 an hour they were putting their jobs in jeopardy.

B. Snodgrass called Derrick Roe and told him that he was being laid off along with all Fort Wayne employees due to grievances being filed against Respondent. B. Snodgrass told Roe that if the grievances were withdrawn the employees could possibly go back to work at GM. Brent Miller received a mes-

[9] On January 28, Smith had asked Lackey if she could be laid off in place of Leach and Alvarez. Smith made the request to avoid quitting because she wanted to start alternative employment in February. Lackey stated that it was not time for Smith to be laid off. The record fails to establish that Smith had made a definite decision to leave, since Lackey had refused her layoff request. In this regard, quitting as opposed to being laid off, may have had future ramifications on her referral status with the Union. I therefore find that Smith is entitled to backpay for the full period, minus interim earnings, for the January 31 layoff which I find to be unlawful later on in this decision.

sage on his answering machine from B. Snodgrass stating that the job was being stopped due to a discrepancy between Platt and B. Snodgrass over pay. B. Snodgrass told Kerry Caba that he was laying off the Fort Wayne area members because B. Snodgrass had a stack of grievances filed against him. B. Snodgrass told Dirk Dezelan that he would no longer need his services and that "the Union has got his hands behind his back, that he has tried to work with them on this but he said, they are just not being reasonable." B. Snodgrass told Dezelan to call his business agent and tell him that he is the reason Dezelan lost his job. B. Snodgrass told James Horstman that he did not need the Fort Wayne sheet metal workers and that there was a misunderstanding regarding the NMA between the Fort Wayne Local and Respondent.[10] He stated that they would call the employees back if things were worked out. B. Snodgrass told Randy Bowman that the reason the employees were being laid off was that Platt was filing three to five grievances a day.

B. Snodgrass told Kent Engle that he was laying everyone in the Fort Wayne Local off because of a dispute between himself and Platt. During a phone call with Steve Gerdom, Gerdom stated that he wished that B. Snodgrass could work out the quarter an hour issue, that they could all go back to work and find an arbitrator to help them work it out. B. Snodgrass stated that he had performed under the NMA in Indiana and he never had to pay premium pay. Gerdom said that there was a lot of work to be done out there and that he wanted to go back to work as soon as possible. B. Snodgrass stated that he was being bombard by 13 grievances on the job. B. Snodgrass stated that he had some men in his company who would probably finish the job, that Respondent would not need Fort Wayne sheet metal workers, and that everyone was going to be laid off. The 13 discriminatees named in the complaint received written layoff notices dated February 1, with their paychecks.

On February 1, B. Snodgrass faxed Local 20 Business Manager Jay Potesta a letter, which B. Snodgrass copied to Platt. It reads in pertinent part:

> I need your help to employ Fort Wayne Local 20 sheet metal workers. Mr. Platt is unable to interpret the National Maintenance Agreement and as such is causing eleven craft people to be unemployed. I have personally spoken to these craft people and they are desperately in need of their jobs and your help.

In the February 1 letter, B. Snodgrass quoted from NMA article XV(2) and article XV(3) as justification for Respondent's refusal to pay $.25-shift pay for work performed on Saturdays and Sundays. B. Snodgrass went on to state in the letter that:

> Because of the grievance filed on this issue as well as a mountain of baseless grievances filed on this project by David Platt we have decided per Article XXII(6) and Article XIX(2) to suspend all Saturday evening work as well as the employment of all Fort Wayne local 20 members until these issues are resolved.
>
> I, and the craftsmen of Local 20 Fort Wayne, are asking for your immediate intervention in this matter so we can get the men back to work. I look forward to hearing from you one way or the other.

Platt's credited testimony reveals that on February 6, the premium pay grievance was resolved, during a step 3 meeting under the NMA, when Sheet Metal Workers International Representative David Harmes and Platt met with B. Snodgrass and Turner. During that meeting, B. Snodgrass agreed to pay the 25 cents for the shift premium, agreed to make the $.90-per-hour deduction for the credit union, and agreed to put the steward back to work. Platt testified that Local 20 dropped the grievance relating to Respondent's failure to work the men on December 24 and on January 7. Harmes faxed B. Snodgrass a written status report concerning these grievances on February 27.[11] Harmes wrote that the shift premium pay and credit union grievances were resolved in that Respondent agreed to pay the $.25-per-hour second-shift pay and make the employees whole. Respondent also agreed to make the credit union deduction. Harmes stated that, despite its agreement to rehire Leach, Respondent had not done so although it continued to work for the Indianapolis employees. Therefore, the Union was continuing with this grievance. Contrary to Platt's recollection of the February 6 meeting, Harmes stated that the Union was continuing the grievance for the lost 2 days of work.

C. The Testimony of Brad Snodgrass

B. Snodgrass testified as follows: He called Turner, on Monday, January 29, and the main topic of conversation was B. Snodgrass' question concerning what he could do about the problems they were having with the Fort Wayne area Local. Turner stated that the project was moving into a phase where they could keep GM happy with only four employees on the job because GM was dictating areas where Respondent could and could not work. B. Snodgrass testified that, "[w]e collectively made the decision to release the Fort Wayne employees and work the four Indianapolis employees until such time equipment arrived on the job where we would need to re-man up the job." He explained that one of the biggest portions of the work related to exhaust fans GM ordered and Respondent had no control over the delivery of the fans. Spiral pipe was also being delivered to the job and there were at least two Saturdays when expected deliveries did not show resulting in little work that could be accomplished. Respondent was contractually obligated to pay 2 hours showup pay and they wanted to avoid a situation where they were paying people to do nothing. The four Indianapolis employees were retained because they were Respondent's most productive employees and had worked on prior projects for Respondent. B. Snodgrass testified that the job was at a point where it could be manned by four men and "coupled with the fact that we were having problems with the Fort Wayne union members enabled us to work four people on the job and lay off the Fort Wayne people." He claimed that Respondent would have reduced the job to four employees at that time regardless of whether the Union filed grievances. However, this assertion is not credible because following this conversation with Turner, B. Snodgrass faxed the January 30 letter to Platt wherein B. Snodgrass stated Respondent's posi-

[10] Lackey had told Horstman, prior to the layoff, that the job might last until the spring.

[11] Respondent admits that it received Harmes' February 27 letter.

tion on the Union's grievances and then stated, "If this is a problem for you, or any or your men, let me know and we will lay off all of the Fort Wayne people. Try me: I will make sure the men know who cost them their jobs."

Moreover, B. Snodgrass also testified as follows:

> Q. BY MR. SNODGRASS: All right. Let us go back. What caused you to lay the employees off, Brad?
>
> A. The problems that we were having on the job.
>
> JUDGE FINE: What problems were that, sir?
>
> THE WITNESS: Typically, every Monday or Tuesday morning after a weekend's worth of work, I would get a series of faxes from Dave, in various forms of issues and—
>
> Q. BY MR. SNODGRASS: You say, Dave. That is?
>
> A. Dave Platt.
>
> JUDGE FINE: Were these grievances?
>
> THE WITNESS: Well, once I got a form on the National Maintenance Agreement form, once I got one on a form—I have got Complaints on several different forms. I got complaints that were not on any forms, things that needed to be addressed.
>
> JUDGE FINE: About the job?
>
> THE WITNESS: Yes.
>
> JUDGE FINE: Complaints about the work being performed or the—
>
> THE WITNESS: Either conditions, or pay, or whatever. I called my Superintendent and I asked him—I said, you know, what are we going to do? What is going on here? What are we going to do here? Every time we work—

B. Snodgrass also testified that he called all of the alleged discriminatees to inform them that they were going to be laid off and during the call he told them that he was having a hard time with Platt. He went on to testify:

> JUDGE FINE: Did you discuss the grievances with these employees?
>
> THE WITNESS: I did. I do not remember every conversation I had with every employee but I do and especially, you know, after listening to a lot of these folks talk. You know, I do remember having several conversations with several people about problems, grievances.
>
> JUDGE FINE: Did you tell any of them that was the reason they were being laid off was because the union had filed grievances?
>
> THE WITNESS: I told them that we had to figure our how we could move forward because of all the problems that were on the job.
>
> JUDGE FINE: Did you tell any of them that the reason they were laid off was the union was filing grievances?
>
> THE WITNESS: I would say, yes.

B. Snodgrass testified that the NMA was the prevailing agreement on the job and that it was his understanding that article IV, grievances is to be followed when the NMA is the prevailing contract.[12] B. Snodgrass testified that no grievance was filed over the January 31 layoff and it was his understanding that grievance procedure is supposed to be followed.

Respondent submitted no documentation from GM for the need to change the project prior to the January 31 layoff of the Fort Wayne employees. Rather, B. Snodgrass testified that Project Manager Jerry May and Turner received calls from GM as to the status of the work. B. Snodgrass did not talk to anyone from GM about the layoff. Both May and Turner remained employed by Respondent at the time of the hearing, but neither were called to testify. B. Snodgrass admitted that Respondent continued to perform sheet metal work at the GM jobsite after the Fort Wayne employees were laid off. B. Snodgrass mentioned that there was a letter from GM that Respondent received on March 11 documenting the need to change the staffing at the project. However, this letter was not entered into evidence. B. Snodgrass testified that the letter addresses the need to increase the work at the jobsite.

D. Positions of the Parties

The General Counsel asserts that the work at the GM jobsite was performed under the NMA and the Fort Wayne Agreement in that certain provisions of the NMA and of the SFU Agreement, both of which Respondent is signatory, require that Respondent apply the Fort Wayne Agreement when performing work in the Fort Wayne area. It is asserted that following his referral of Fort Wayne area employees to the jobsite, Platt initiated complaints about working conditions to Respondent, as well as filed several grievances. B. Snodgrass' written statements to union officials, statements to employees during phone calls, admissions during his testimony, and the timing of the layoff in relation to Platt's grievance filing reveal that the January 31 layoff of the Fort Wayne area employees was caused by the grievances. The General Counsel claims that the grievances have arguable merit and were filed in good faith. It is contended that the General Counsel has established a prima facie case that the layoffs were unlawfully motivated. Noting that Respondent failed to call Turner or May as a witness, or to provide any documentary evidence supporting the need for the layoffs it is asserted that Respondent has failed to rebut that case. The General Counsel asserts that there is nothing in the NMA that waives employees' Section 7 rights regarding the layoff.

Respondent contends, in its posthearing brief, that the NMA was the prevailing contract pertaining to the GM jobsite. It asserts that the Local 20's grievances were not filed in good faith. Respondent asserts that no threats were made to any employees. Rather, when Respondent was asked questions by employees those questions were answered truthfully. Respondent asserts that there were no grievances filed under the NMA. It asserts that it did not layoff employees because they formed, joined, and assisted the Union and engaged in concerted activities, or to discourage employees from engaging in these activities since Respondent was signatory to the NMA which assured

[12] At one point in his testimony, B. Snodgrass stated that Local 20's grievances were not filed under the NMA, and therefore, there were no grievances as defined in the contract. I do not credit B. Snodgrass' testimony on this point. He filed written responses to the grievances discussing NMA contract language, and he admitted in his testimony to receiving at least one grievance on an NMA form.

that all employees on the jobsite would be represented by a union.

Respondent asserts that the tenure and terms and conditions of the employees at the jobsite were controlled by GM, not by the Respondent. Respondent cites several provisions of the NMA in support of its position and contends that it acted in accord with the terms of the NMA concerning the grievances and when it laid off the employees. It contends that the business agent failed to act in the best interest of his members in that he failed to file a grievance over the layoff under the NMA. It asserts that the unfair labor practice charge filed by Local 20 over the layoff is a violation of the NMA and that this was an intentional act, therefore, Respondent requests treble damages from Local 20. It also requests that Local 20 be required to pay the employees the amount they were told by Local 20 that they would be paid by Respondent.

E. Analysis

In *Garage Management Corp.*, 334 NLRB 940, 951 (2001), the following principles were set forth concerning the protected status of an employee's attempt to enforce a collective-bargaining agreement:

> Pace unquestionably engaged in protected, concerted activities by his filing charges, grievances, and through the other activities set forth above. The filing of a charge is protected activity. *Summitville Tiles*, 300 NLRB 64, 65 (1990).
>
> In *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984), the Supreme Court endorsed the Board's *Interboro* doctrine [FN2] which recognizes that an employee's "honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated."
>
> The Board has held that "it is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith." *Wagner-Smith Co.*, 262 NLRB 999 fn. 2 (1982), or with malice. *Afro Urban Transportation*, 220 NLRB 1371 (1975).

In *Goodyear Tire & Rubber Co.*, 271 NLRB 343, 345 (1984), it was stated that:

> As a general rule, performance of steward functions by an employee is a protected activity. One of the most important steward functions is the filing of grievances. When filing and processing grievances, stewards are protected by the Act even if they "exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure."

While Platt, Local 20's business agent, was not Respondent's employee, Platt directed a series of grievances and complaints against Respondent on behalf of Respondent's employees. These grievances were filed as a result of reports to Platt from Respondent's employee Leach, the steward at Respondent's GM jobsite. I find that Platt was engaging in protected activity on behalf of Respondent's employees when as Local 20's business agent he initiated grievances and complaints on their behalf while he was attempting to enforce what he believed to be were the applicable collective-bargaining agreements. See *BE & K Construction, Co.*, 329 NLRB 717, 724–725 (1999), where the Board held that a union, apart from employees, can engage in conduct protected by Section 7 of the Act. In *BE & K Construction* the respondent was found to have violated Section 8(a)(1) of the Act by filing and maintaining a lawsuit against unions because they engaged in protected concerted activity.[13] The fact that Respondent's employees, aside from Leach, may not have been aware or may not have directly participated in Platt's decision to file the grievances is not controlling here. In *Dayton Hudson Department Store Co.*, 324 NLRB 33, 35–36 (1997), the Board found that the respondent there unlawfully discharged employee Ryan even though Ryan was opposed to unionization. The Board nevertheless found Ryan's discharge to be unlawful because the employer discharged Ryan in order to '"discourage' employees from joining the Union and from reinvigorating the moribund union campaign." I find that B. Snodgrass' statements to union officials Platt and Potesta and to the employees were designed to discourage employees and their representatives from filing grievances, an activity protected by the Act and for the reasons set forth below that these statements violated Section 8(a)(1) of the Act. I also find, as set forth below, that Respondent's January 31 layoff of the 13 discriminatees was violative of Section 8(a)(1) and (3) of the Act.[14]

I do not find that Platt's complaints and grievances about working conditions were frivolous, filed to harass Respondent, or otherwise initiated in bad faith. Platt filed the initial grievance for the GM jobsite on January 9, through the NMA grievance procedure asserting that Respondent violated NMA article XII, section 1, by failing to provide work for employees on December 24, 2000, and on January 7. That article contains a statement that, "Procedures for prior notification of work cancellation shall be determined at the pre-job conference." Platt's testimony is undenied that Turner informed him during the prejob conference that Respondent would work December 23 through 31, 2000, except Christmas and New Year's day. Thus, Turner had informed Platt that Respondent intended to work December 24. Platt asserts in the grievance that Turner also agreed, during the prejob conference, to work every Saturday and Sunday until completion.[15] By letter dated January 30,

[13] See also, *Diamond Walnut Growers*, 312 NLRB 61 (1993), enfd. 53 F.3d 1095 (9th Cir. 1995), and *Dahl Fish Co.*, 279 NLRB 1084, 1110–1111 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987), where the filing of baseless civil actions against unions was found to be violative of Sec. 8(a)(1) of the Act.

[14] See *Summitville Tiles*, 300 NLRB 64, 65 (1990), where the Board held that when an unfair labor practice charge is filed by a union it is a violation of Sec. 8(a)(1) and (4) of the Act for an employer to retaliate against an employee because the employee is named in the charge. It is similarly violative of the Act to retaliate against the employees here because the Union filed grievances on their behalf.

[15] Respondent stipulated at the hearing that, following the Christmas shutdown, the employees were working a Saturday and Sunday work schedule.

B. Snodgrass cited NMA article XXIII, section 1, the NMA's "Management Clause" to the Union in defense of this grievance. This provision gives an employer certain rights with respect to directing the work, laying off employees, and to decide the number of men needed. While there is a tension in the competing contractual provisions cited by the parties concerning this grievance, I need not decide whether the Union would ultimately prevail over Platt's grievance. Rather, the grievance was grounded in a contract provision cited to Respondent at the time that the grievance was filed. There is no evidence that the grievance was filed with malice. Accordingly, I find that the grievance was filed in good faith.[16]

On January 29, Platt filed two grievances with Respondent over the layoff of Union Steward Leach, one under the NMA and the other under the Fort Wayne Agreement. In the NMA grievance, Platt cited article VII, section 1, stating that, "The [s]teward shall be the last employee to be laid off, provided he is qualified to perform the work which remains to be done at the job." Additionally, article VIII, section 6 of the SFU Agreement which Respondent is signatory to provide, in pertinent part, that when an employer performs work outside of an area covered by the agreement that the employer "shall be governed by established working conditions of that local agreement." It is contended that this provision of the SFU Agreement made the Fort Wayne Agreement applicable to Respondent when it performed work at the GM jobsite. The provision that Platt cited in his grievance over Leach's layoff under the Fort Wayne Agreement is addendum X, section 1(e). This provision provides that the steward shall be the last man laid off with the exception of the foreman. While Respondent has cited contractual language in support of its position that Leach's layoff was proper including article XIX, section 2 which states that the employer shall determine the competency of all employees, I am not required to resolve this contractual dispute. Platt's grievances were based on reasonable contractual positions, and I have concluded that these grievances were filed in good faith.

I find that Platt's grievances on shift pay and the credit union deduction were filed in good faith. On January 29, Platt filed two grievances with Respondent one under the NMA, and one under the Fort Wayne Agreement concerning Respondent's failure to pay premium pay on the second shift. The grievance under the Fort Wayne Agreement also cited Respondent's failure to make a $.90-per-hour credit union deduction. The General Counsel asserts that NMA article VIII, section 1 and article IX, section 1 require Respondent to pay the wage rates and fund payments as set forth in the current contract of the local union where the work is to be performed and that these provisions of the NMA make the Fort Wayne Agreement applicable to Respondent when it performs work in the Fort Wayne area. Platt cited article XIV, section 2 of the NMA in both the NMA and Fort Wayne Agreement grievances concerning shift pay. Platt, however, misstated the contract provision as he was obviously referring to NMA article XV, section 2, which states in pertinent part that second-shift work shall be at the "employee's regular straight-time hourly rate plus $.25." Additionally, in support of these grievances, and prior to the January 31 layoff, Platt faxed B. Snodgrass a copy of an NMAPC interpretation of NMA article XV. The document is dated September 8, 1989, and it states therein that "shift additives are payable on overtime shifts performed on Saturday, Sundays, and Holidays, the same as shifts worked during the standard work week." Respondent cited to the Union NMA article XV, section 3, which states that, "[a]ll work commencing with the beginning of the established work day on Saturday shall paid at the rate of time and one-half. All work commencing with the beginning of the established work day on Sundays . . . shall be paid at the rate applicable in the appropriate local agreement not to exceed double-time" in support of its position that there was to be no shift pay for Saturday and Sunday work. However, noting that Platt supplied Respondent with an NMAPC directive supporting his position it cannot be said that the grievances were frivolous or otherwise filed in bad faith. In this regard, the NMA provides that the NMAPC is a joint labor and management committee that administers the NMA. Platt also cited addendum VIII, section 3(d) of the Fort Wayne Agreement in his grievance calling for the $.90-credit union deduction.

I find that Platt acted in good faith and was engaged in protected union activity when he filed grievances to enforce the applicable collective-bargaining agreements on behalf of Respondent's employees based on complaints generated by the job steward. In sum, on January 9, Platt filed a grievance over Respondent's failure to work employees for 2 days. On January 29, Platt filed two grievances over the layoff of the steward as well as two grievances over Respondent's failure to pay-shift pay for Saturday and Sunday work. On January 30, B. Snodgrass responded to Platt by letter stating Respondent's position on the grievances and denying their merit. B. Snodgrass ended the letter by stating, "If this is a problem to you, or any of your men, let me know and we will lay off all of the Fort Wayne people. Try me: I will make sure the men know who cost them their jobs." Platt credibly testified that he showed this letter to some of Respondent's employees. Similarly, on February 1, B. Snodgrass wrote union official Potesta stating that Platt was causing Fort Wayne sheet metal workers to be unemployed because Platt was unable to interpret the NMA. B. Snodgrass went on to state that because of a mountain of baseless grievances filed by Platt, Respondent suspended Saturday evening work as well as the employment of all Local 20 Fort Wayne members until these issues are resolved. I find that these statements to the union officials constituted threats of loss of employment for bargaining unit members because of Platt's protected grievance activity in an effort to restrain that activity and that Respondent violated Section 8(a)(1) of the Act by issuing these letters. See *BE & K Construction, Co.*, 329 NLRB 717, 724–725 (1999); *Diamond Walnut Growers*, 312 NLRB 61 (1993), enfd. 53 F.3d 1095 (9th

[16] On January 24, as a result of a complaint from the job steward, Platt faxed a letter to Respondent requesting that the employees be given dust masks. B. Snodgrass responded the same day that the masks would be provided. There was no claim by Respondent that this complaint was made in bad faith.

(9th Cir. 1995); and *Dahl Fish Co.*, 279 NLRB 1084, 1110–1111 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987).[17]

I also find that beginning on January 31, B. Snodgrass violated Section 8(a)(1) of the Act by statements he made to employees during a series of phone calls he initiated on that date. B. Snodgrass made the following statements to employees: He told Kay Smith that he was laying off all of the Fort Wayne employees, that he had a stack of grievances on his desk and he was tired of them, and that Platt was the reason she was losing her job. He told Jack Johnston that Johnston was being laid off and that B. Snodgrass had a stack of grievances to go through and nobody would be going to work until he got to the bottom of them. B. Snodgrass told Derrick Roe that he was laying off all the Fort Wayne employees due to grievances being filed against B. Snodgrass. B. Snodgrass told Randy Bowman that he was being laid off because "Platt was filing 3–5 grievances a day" and that he could not afford the Fort Wayne members because so many grievances were being filed. The credited testimony reveals that B. Snodgrass made similar remarks to several other of Respondent's employees. I find that by making these statements B. Snodgrass coerced and restrained employees in violation of Section 8(a)(1) of the Act by informing employees that they were being laid off because the Union had filed grievances.

Joseph Grubb's testimony reveals that B. Snodgrass told him that by pushing for a $.25-shift bonus the employees were putting their jobs in jeopardy. B. Snodgrass made a similar statement to Kay Smith in that he told her that he was not dealing with the $.25-shift bonus grievance and that she should call Platt to let him know he was the reason she was losing her job. I find that these statements constitute threats to employees of loss of jobs because the Union raised complaints about wages and that they are violative of Section 8(a)(1) of the Act.

B. Snodgrass told Timothy Tanner that some grievances had been filed over premium pay and that he had no intention of paying it. He told Tanner to call Platt and that if the grievances were resolved the employees would go back to work. B. Snodgrass told Smith that he liked Smith's work but that he could not deal with the grievances anymore. He told her to call Platt and let him know that he was the reason Smith was losing her job. B. Snodgrass told Jack Johnston that he had a stack of grievances to go through and that no one was going to work until they got to the bottom of it. He told Johnston to call the business agent and let him know about it. B. Snodgrass told Derrick Roe if the grievances were withdrawn the employees could possibly go back to work at GM. He also told Dirk Dezelan that he should call his business agent to let him know that he was the reason that Dezelan lost his job. B. Snodgrass told James Horstman that there was a misunderstanding between Respondent and the Fort Wayne local about the NMA, and that the Fort Wayne employees would be called back to work if things were worked out. I find that Respondent coerced and restrained employees in the exercise of their Section 7 rights by instructing employees to request the Union to withdraw its grievances and promising employees that they would be recalled to work if the Union acceded to their request. See *Pioneer Recycling Corp.*, 323 NLRB 652, 658 (1997).

I find that the General Counsel has established a prima facie case under the Board's criteria set forth in *Wright Line* that the January 31 layoffs were caused by the Union's protected activity of filing grievances.[18] The record contains direct evidence of statements made in writing and on the phone by B. Snodgrass to Platt and to the employees before the layoffs and to Potesta after the layoffs that the employees were laid off due to Platt's grievance activity. The burden shifts to Respondent to establish that the employees would have been laid off absent the Union's grievance activity. Respondent has failed to meet this burden.

Respondent's sole witness was B. Snodgrass. He testified that he sought counsel from Superintendent Turner about all of the Union's grievance filings. As a result, Turner informed him that they had come to a point in the job where they could keep GM happy with only four employees. He testified that since they could man the job with four employees coupled with the problems they were having with the Fort Wayne union caused them to layoff the employees. However, B. Snodgrass also testified that Respondent would have reduced the job at that time to four employees regardless of whether the Union filed the grievances. Taking into consideration his demeanor, I do not credit B. Snodgrass' testimony that Respondent would have reduced the job on January 31, absent the Local 20's grievance activity, nor do I find that GM required Respondent to reduce the job. B. Snodgrass never had direct conversations with GM about the status of the job, and Respondent failed to call Turner or Project Manager Jerry May to testify, although both remained employed by Respondent at the time of the hearing and they were Respondent's contacts with GM.[19] Moreover, B. Snodgrass testified that he called the Fort Wayne area employees to inform them of the layoff because he owed them an explanation. However, the only explanation that he gave them was that they were being laid off because of Platt's grievance filing activities. While he told Kay Smith that GM had taken the time limit off the job so that it could be manned by the four Indianapolis employees, B. Snodgrass never told Smith that GM required the layoff. Rather, B. Snodgrass told Smith to call Platt "to let him know that he is the reason you are losing your job." Accordingly, I find that the General Counsel has

[17] The Region did not allege the remarks in these letters to be violative of the Act in the complaint. However, the content of the letters was fully litigated and the nature of these remarks is closely related to the unfair labor practice allegations set forth in the complaint. See *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994), and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

[18] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[19] I find that an adverse inference is warranted by Respondent's failure to call either May or Turner as a witness. See *Robin Transportation*, 310 NLRB 411, 417 fn. 15 (1993). Respondent also failed to introduce any documentary evidence that GM required the job to be reduced.

established that the discriminatees were laid off on January 31 because of the Union's grievance filing activities.[20]

Ordinarily the discussion would end here and a violation of the Act would be found. However, Respondent asserts in its posthearing brief that Local 20 violated the NMA by filing an unfair labor practice charge with the Board over the layoffs rather than grieving the matter under the NMA. Respondent seeks, in its brief, treble damages for the Union's alleged breach of the NMA. Respondent in essence contends that Local 20 waived its right to file a charge with the Board over the January 31 layoff based on language contained in the NMA.

It was stated in *American Broadcasting Co.*, 290 NLRB 86, 88, (1988) that:

> A union . . . may contractually relinquish a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Clinchfield Coal Co.*, 275 NLRB 1384 (1985); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962). In *United Technologies Corp.*, 274 NLRB 504 at 507 (1985), the Board noted with approval the following language of the court in *Chesapeake and Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), enfg. 259 NLRB 225(1981):
>
> > [N]ational labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of a collective-bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory right. [Citation omitted.]

Respondent cites the following NMA provisions in its posthearing brief in support of its contractual waiver argument concerning the January 31 layoffs. Respondent asserts that article I—RECOGNITION, section 11 provides that the "Umpire is not authorized to award back pay or any damages for a misassignment of work. Nor may any party to this procedure bring an independent action for back pay or any other damages." However, article I of the NMA, when viewed in the context of all of its provisions, was plainly meant as a vehicle to resolve work assignment disputes between the sheet metal workers and other labor organizations. Article I, section 2, defines the nature of sheet metal work and states that when work is given to an employer that is within the recognized jurisdiction of another union with which the employer has a similar agreement for the performance of that work, "then work assignments shall be made in accordance with Agreements and Decisions of Record, attested Agreements, established trade practice or prevailing area practice." Article I, section 5 provides that "there shall be no strikes, lockouts, work stoppages, or picketing arising out of any jurisdictional dispute." Article 1, section 6 provides that, "Since presently established jurisdictional dispute settlement procedures are not applicable to work covered by the Agreement, all signatory Unions and all signatory Employers stipulate that they will abide by the following procedures for the resolution of jurisdictional disputes." Thereafter, article 1, sections 6, 7, 8, 9, 10, 11, 12, 13, and 14, set out the contractual procedure for resolving jurisdictional disputes among competing crafts. The instant case doe not involve a jurisdictional dispute between competing craft unions, and the language Respondent sites in article I, section 11 is plainly inapplicable to the situation here where employees were laid off because their union representative filed grievances on their behalf. I note in passing that article 1 sets up a dispute resolution procedure for jurisdictional disputes that is totally separate from the contracts grievance procedure.

Respondent next cites NMA article XI—GRIEVANCES, section 1, which states:

> All grievances shall be filed within ten (10) calendar days after the complained of event arose. Grievances shall be appealed to the next higher step within ten (10) calendar days after the meeting in the lower step. Settlement of grievances may be arrived at in any step of the grievance procedure which will be final and binding on the Union and the Employer.
>
> Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this Agreement, shall be handled in the following manner.

Respondent also cites the following provisions from the NMA agreement: Article XIX—HIRING AND TRANSFER OF CRAFTWORKERS, section 2 states that the employer shall determine the competency of all employees, the number of workers required on the project, and shall select any employee or employees working under the terms of this Agreement to be laid off regardless of membership or non membership in the Union. Article XXI—CREW SIZE, section 1 states, "The crew size shall be any number of craftworkers and supervision required to safely perform the work and shall be increased or decreased at the discretion of the Employer." The General Counsel points out that article XXIII—MANAGEMENT CLAUSE, section 1 sets forth certain rights of an employer under the NMA including the right to "lay off employees and supervision because of lack of work or for other legitimate reasons," but that this article also states "that the Employer will not use these rights for the purpose of discrimination against any employee."

In reviewing these provisions, I have concluded that, while the January 31, layoffs may have been cognizable under the NMA's grievance procedure, there was no contractual requirement that the Union use that grievance procedure rather than resort to the Board in cases involving allegations of discrimination for protected activities under the Act. For example, there is no language in the NMA grievance procedure similar to that

[20] I note that Turner told Platt that Respondent wanted to complete the project sometime before June 1, during the prejob conference and Lackey told Smith on January 28, that it was not time for her to be laid off. Lackey also told Horstman, prior to the layoff, that the job might last until spring. Moreover, during his phone call with Gerdom, B. Snodgrass did not deny Gerdom's assertion that there was a lot of work to be done at the GM project. Rather, B. Snodgrass raised the Union's grievance filing as the reason for the layoff.

in article 1, section 6 relating to jurisdictional disputes which states that "all signatory Unions and all signatory Employers stipulate that they will abide by the following procedures for the resolution of jurisdictional disputes." In other words there is nothing in the contract which requires the parties to file a grievance rather than resort to the Board's processes for statutory discrimination claims. I therefore conclude that the cited contractual language pertaining to grievances fails to establish a clear and unmistakable waiver of the Union's access to the Board for the vindication of the employees Section 7 rights. See *American Broadcasting Co.*, supra., and *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 805 (2001), where it was held that the inclusion of a specific contract provision according to a union contractual right does not serve to constitute a waiver of a general statutory right under the Act.

These principles are particularly apt here, where the facts reveal that Respondent informed virtually every discriminatee that they were being laid off because the Union was filing grievances and by this unlawful conduct Respondent sought to coerce the employees to pressure the Union to withdraw those grievances. Respondent sought to undermine the very grievance procedure it now seeks to rely on as a shield from the Union's unfair labor practice charge. In fact, Respondent now seeks treble damages against the Union for the Union's failure to file a grievance over Respondent's unlawful layoff of its employees when in fact it laid off those employees because the Union had filed grievances on their behalf. Respondent's actions here serve to underscore the animus to which it holds employee Section 7 rights. I note that resort to an arbitrator, whose expertise is contract interpretation not unfair labor practice litigation, would not serve to vindicate the employees Section 7 rights here. An arbitrator cannot order the posting of a Board notice to remedy Respondent's repeated threats to the Union and its employees. I find that there has been no clear and unmistakable contract waiver of the Union's resort to the Board concerning the January 31 layoff, and that arbitration is not the preferred course to resolve the statutory violations that have occurred here.[21] Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by its January 31, layoff of Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan because the Union had filed contractual grievances on their behalf.

CONCLUSIONS OF LAW

1. Brad Snodgrass, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 20, Sheet Metal Workers International Association a/w Sheet Metal Workers International Association, AFL–CIO (Local 20) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Informing employees and their Union representatives that employees were being laid off because Local 20 filed grievances.

(b) Threatening employees with loss of jobs because Local 20 raised complaints about wages.

(c) Instructing employees to request that Local 20 withdraw its grievances and promising employees that they would be recalled to work if the Local 20 withdrew those grievances.

4. Respondent violated Section 8(a)(1) and (3) of the Act by on January 31, 2001, laying off employees Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan because Local 20 filed contractual grievances on their behalf.

REMEDY

The Respondent, having discriminatorily laid off employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the January 31, 2001, layoff until the date the layoff ended, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Counsel for the General Counsel stated at the hearing, in consultation with counsel for Local 20, that the General Counsel was not seeking a reinstatement remedy for the alleged discriminatees. Rather, it was asserted that the 13 layoffs occurred on January 31, and on March 31, Respondent requested that Local 20 refer 12 Fort Wayne area employees to work for Respondent at the GM jobsite. Since Respondent had no control of which individuals the Union referred, it was the position of the General Counsel and the Charging Party that backpay for 12 of the alleged discriminatees was tolled as of March 31, 2001. It was asserted that depending on a review of Respondent's records at the compliance stage of this proceeding that backpay for the 13th discriminatee may run from January 31 until Respondent's work at the GM jobsite ended. I agree with this position as an appropriate way in which to remedy this dispute, although some of the 12 employees referred to Respondent by Local 20 on March 31, had not previously worked at the GM jobsite. I make no finding as to how the money should specifically be divided among the 13 discriminatees, but have concluded that this is a matter better left for the compliance stage of this proceeding.[22]

[21] It is not clear that a union could waive its access rights to the Board. See *West Point Pepperell, Inc.*, 200 NLRB 1031, 1039, (1979), where citing *NLRB v. General Motors Corp.*, 116 F. 2d 306, 311–312 (7th Cir. 1940), it was held that if "the Union's contractual undertaking were such that it prohibited in all respects the Union's filing of the charge with the Board, that prohibition *as a matter of public policy* would not be binding on the Board, nor, it would appear, on the Union."

[22] The complaint requests that the Board order Respondent to "reimburse all discriminatees entitled to a monetary award in this case for any extra federal, and/or state income taxes that would or may result from the lump sum payment of the award." The General Counsel's request would represent a change in Board law. See *Paliotta General Contractors*, 333 NLRB No. 80, fn. 1 (2001) (not reported in Board volumes), and *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). The parties have not briefed this issue to me, and since this a request for a change in the law, this question should be reserved for the Board. Accordingly, I decline to grant the

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Brad Snodgrass, Inc., of Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees or their union representatives that employees were being laid off because Local 20 filed grievances.

(b) Threatening employees with loss of jobs because Local 20 raised wage complaints.

(c) Instructing employees to request that Local 20 withdraw its grievances and promising employees that they would be recalled to work if the Local 20 withdrew those grievances.

(d) Laying off employees because they have engaged in union or protected activities or because Local 20 has filed grievances on their behalf.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to its unlawful layoff of Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan, and within 3 days thereafter, notify them in writing that this has been done and that their layoffs will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by Region 25, post at its facility in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Additionally, within 14 days after service by the Region, Respondent shall duplicate and mail at its own expense a copy of said notice to all employees who were employed by Respondent at the Fort Wayne area GM jobsite at any time since January 1, 2001, until the completion of the employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after January 1, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT inform employees or their union representatives that employees are being laid off because Local No. 20, Sheet Metal Workers International Association, a/w Sheet Metal Workers International Association, AFL–CIO filed grievances or raised wage complaints.

WE WILL NOT instruct employees to request Local 20 to withdraw its grievances and promise employees that they will be recalled to work if the Local 20 withdraws those grievances.

WE WILL NOT lay off employees because they have engaged in union or protected activities or because Local 20 has filed grievances on their behalf.

General Counsel's request for money lost to taxes. See *Paliotta General Contractors*, supra.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Kay Smith, Stephen Gerdom, Derrick Roe, Randy Bowman, Timothy Tanner, Kerry Caba, Jack Johnston, Brent Miller, Barry Harris, James Horstman, Joseph Grubb, Kent Engle, and Dirk Dezelan whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful layoff of the above-named employees and within 3 days thereafter, notify them in writing that this has been done and that their layoffs will not be used against them in any way.

BRAD SNODGRASS, INC.